SUPREME COURT OF FLORIDA

FRIDAY, MARCH 23, 1979

CASE NO. 55,396

District Court of Appeal, Third District
Case No. 77-2395

RICHARD EUGENE PEREZ
PETITIONER,

vs

DARLENE STEVENS
RESPONDENT.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App. P. 9.330(d).

OVERTON, SUNDBERG, HATCHETT, and ALDERMAN, JJ., concur
BOYD, Acting C.J., J., dissents

BDM
C: Hon. Louis J. Spallone, Clerk
Hon. M. Ignatius Lester, Judge
Hon. Ralph W. White, Clerk

Ronald A. Dion, Esquire
Magill, Sevier & Reid, P.A.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.
By: /s/ Barbara D Maxwell
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1978
FRIDAY, OCTOBER 20, 1978

CASE NO. 77-2395

RICHARD EUGENE PEREZ,

Appellant,

vs.

DARLENE STEVENS,

Appellee.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy
ATTEST:

/s/
Clerk District Court of
Appeal, Third District

cc: Ronald A. Dion
Magill, Sevier & Reid

/sh

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR MONROE COUNTY, FLORIDA)

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO: 77-2395

RICHARD EUGENE PEREZ,

Appellant,

vs.

DARLENE STEVENS,

Appellee.

MOTION FOR REHEARING OR CERTIFICATION

COMES NOW the Appellant, RICHARD EUGENE PEREZ, by and through undersigned counsel, pursuant to Florida Rules of Appellate Procedure 9.330, and requests a rehearing of this matter, or in the alternative, would request certification of the issue, and would allege in furtherance thereof as follows:

1. The issue presented and ruled upon by this Court was whether a putative father has the right to initiate an action for the purpose of determining the paternity of an illegitimate child.

2. Relying upon the Florida Bastardy Statute, Chapter 742, this Court ruled that, "absent legislative revision of Chapter 742, a putative father is without the right to have himself declared the father of a child who

the mother denies is his. *Ford v. Loeffler,* Case No. 78-325 (Fla., 3 DCA, opinion filed Sept. 19, 1978)."

3. The appellant, putative father, would respectfully submit that such a limited interpretation of Florida Statute, Chapter 742 renders the Statute unconstitutional in violation of the equal protection clauses of the United States and Florida Constitutions.

4. Florida Statute, Chapter 742 has previously been under attack numerous times for violating the concepts of equal protection.

5. In *Brown v. Bray,* 300 So.2d 668 (Fla., 1974), the putative father challenged the constitutionality of the Statute, "because it denies the father of a bastard child the rights the father of a legitimate child enjoys." The Florida Supreme Court upheld the statute's constitutionality by reading into it certain rights belonging to the putative father. "We do not construe Chapter 742 as precluding the Circuit Court in a proper case and upon a sufficient showing from granting the father seeking the same, similar rights of child custody as may be granted a father in a dissolution of marriage situation." Appellant seeks only the right to be able to attempt to establish the sufficient showing which would entitle him to certain rights in reference to his illegitimate child.

6. In *Gammon v. Cobb,* 335 So.2d 261 (Fla., 1976), Florida Statute, Chapter 742 was again attacked on the basis of equal protection. Although Florida Statute 742.011 expressly authorizes a cause of action in determining paternity solely to an "unmarried woman," the Florida Supreme Court ruled such limitation to be unconstitutional. "We hold that portion of Section

742.011, Florida Statutes, which limits actions thereunder to unmarried woman to be unconstitutional in contravention of Article I, Section 2 of the Constitution of the State of Florida, and the Fourteenth Amendment to the Constitution of the United States. . ." Thus, married women were given a cause of action with which to determine paternity.

7. In *In Re: The Estate of Daymon C. Burris,* So.2d (Fla., July 20, 1978, Case No: 52,330), the Florida Supreme Court recognized that the father of an illegitimate child had a cause of action for the recovery of damages for the wrongful death of his illegitimate child.

8. Even the married husband has the legal right to challenge the paternity of "his" child. *Eldridge v. Eldridge,* 16 So.2d 163 (Fla., 1944). "Where a child is born in wedlock, the law extends the right to the reputed father to contest the parentage . . ."

9. If the reputed father has the right to deny paternity, if both unmarried and married women may sue for paternity, and if the father of an illegitimate child has certain rights such as custody and damages for wrongful death, then it is a violation of equal protection to deny him the right to attempt to establish his paternity. Using the criteria and rationale of *Gammon v. Cobb, supra,* there exists no rational basis for denying a putative father his day in Court.

WHEREFORE, Appellant respectfully requests this Honorable Court to grant a rehearing in this cause, or in the alternative, to certify the question for determination by the Florida Supreme Court.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was furnished by U.S. mail this 4th day of October, 1978, to: MAGILL, SEVIER & REID, P.A., Attorneys for Appellee, 509 Whitehead Street, Key West, Florida 33040.

FRANKLIN, ULLMAN, KIMLER
& ENTIN, P.A.
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Tel: 944-9100

By
RONALD A. DION, ESQ.

Richard Eugene PEREZ,

Appellant,

v.

Darlene STEVENS,

Appellee.

No. 77-2395.

District Court of Appeal of Florida,
Third District

Sept. 26, 1978.

Rehearing Denied Oct. 20, 1978.

The Circuit Court, Monroe County, M. Ignatius Lester, J., entered order on mother's motion dismissing putative father's petition for final judgment establishing his paternity as natural and legal father of minor child born out of wedlock to mother. Putative father appealed. The District Court of Appeal, Kehoe, J., held that absent legislative revision of chapter providing jurisdictional basis for a court to determine paternity, putative father was without right to have himself declared father of child who mother denied was his.

Affirmed.

Bastards — 8

Absent legislative revision of chapter providing jurisdictional basis for a court to determine paternity, a putative father is without right to have himself declared father of a child who mother denies is his. West's F.S.A. §742.011 et seq.

Franklin, Ullman, Kimler & Entin, North Miami Beach, and Ronald A. Dion, Miami, for appellant.

Magill, Sevier & Reid and Hector J. Lombana, Miami, Hugh R. Papy, Key West, for appellee.

Before BARKDULL, HUBBART and KEHOE, JJ.

KEHOE, Judge.

Appellant, petitioner below, brings this appeal from an order on respondent's [appellee] motion to dismiss dated November 10, 1977, entered by the trial court dismissing his petition for a final judgment establishing his paternity as the natural and legal father of a minor child born out of wedlock to appellee. We affirm.

At common law, the putative father of an illegitimate child had neither rights nor obligations toward that child. When statutes were devised to protect the interests of illegitimate children, the mother alone was given the right to institute proceedings to determine paternity in order that the innocent child have the benefit of support from the father. See generally *Gammon v. Cobb*, 335 So.2d 261 (Fla. 1976); *Clarke v. Blackburn*, 151 So.2d 325 (Fla. 2d DCA 1963); and *deMoya v. dePena*, 148 So.2d 735 (Fla. 3d DCA 1963).

In the instant case, appellee denies that appellant is the father of the child. We are unaware of any authority which gives a putative father a cause of action to establish that he is the father of a child who the mother denies is his. Chapter 742, Florida Statutes (1977), provides the jurisdictional basis for a court to determine paternity. No case interpreting this Chapter has gone so far as to read into it an intent to give such a cause of action to a putative father. Absent legislative revision of Chapter 742, a putative father is without the right to have himself declared the father of a child who the mother denies is his. *Ford v. Loeffler*, ____So.2d ____(Fla. 3d DCA, opinion filed September 19, 1978). Accordingly, the order appealed is affirmed.

Affirmed.